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13  
 14 **UNITED STATES DISTRICT COURT**  
 15 **CENTRAL DISTRICT OF CALIFORNIA**

16 FAITH PONCE, individually  
 17 and on behalf of all others similarly  
 18 situated,

19 *Plaintiff,*

20 v.

21 HISMILE PTY LTD.,

22 *Defendant.*

23 Case No. 2:24-cv-01496

24 **CLASS ACTION COMPLAINT**

25 **DEMAND FOR JURY TRIAL**

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1 **I. Introduction.**

2 1. Advertised “sale” prices are important to consumers. Consumers are more  
3 likely to purchase an item if they know that they are getting a good deal. Further, if  
4 consumers think that a sale will end soon, they are likely to buy now, rather than wait,  
5 comparison shop, and buy something else.

6 2. While there is nothing wrong with a legitimate sale, a fake one—that is, one  
7 with made-up regular prices, made-up discounts, and made-up expirations—is deceptive  
8 and illegal.

9 3. Section 17500 of California’s False Advertising Law prohibits businesses  
10 from making statements they know or should know to be untrue or misleading. Cal. Bus.  
11 & Prof. Code § 17500. This includes statements falsely suggesting that a product is on  
12 sale, when it actually is not.

13 4. Moreover, Section 17501 of California’s False Advertising Law provides  
14 that “[n]o price shall be advertised as a former price ... unless the alleged former price  
15 was the prevailing market price ... within three months next immediately preceding” the  
16 advertising. Cal. Bus. & Prof. Code § 17501. So, in addition to generally prohibiting  
17 untrue and misleading fake discounts, it also specifically prohibits this particular flavor of  
18 fake discount (where the advertised former price is not the prevailing price during the  
19 specified timeframe).

20 5. In addition, California’s Consumer Legal Remedies Act prohibits  
21 “advertising goods or services with the intent not to sell them as advertised” and  
22 specifically prohibits “false or misleading statements of fact concerning reasons for,  
23 existence of, or amounts of price reductions.” Cal. Civ. Code § 1770(a)(9), (13).

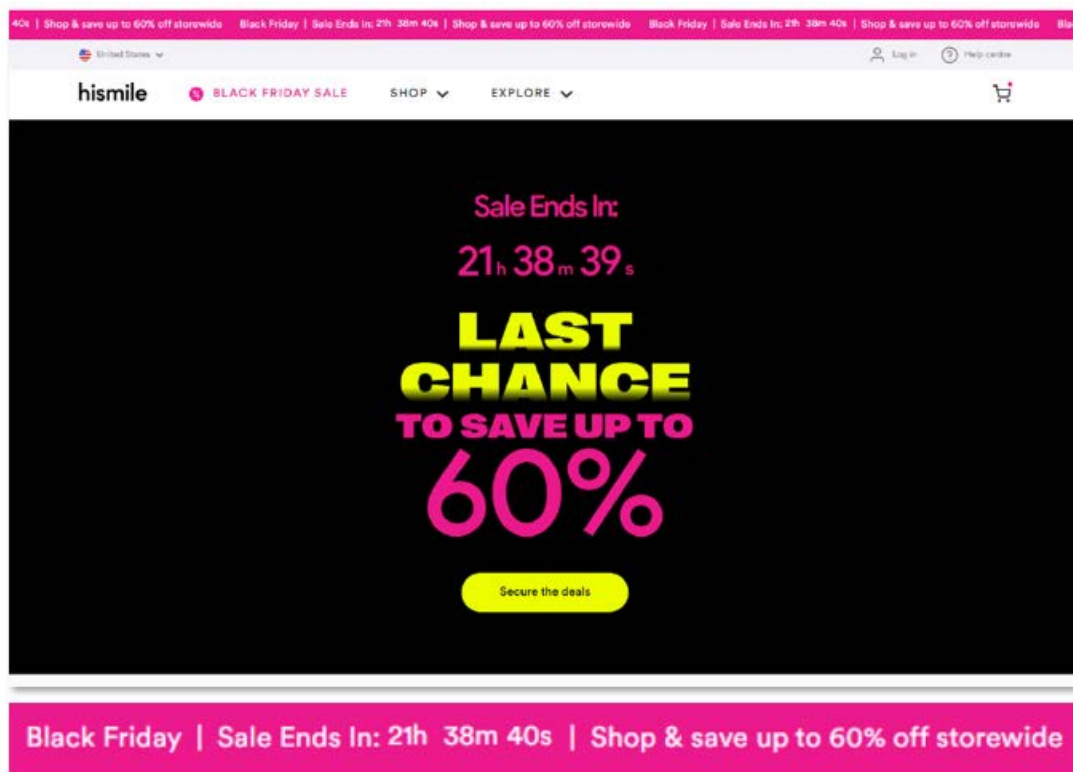
24 6. Moreover, the Federal Trade Commission’s regulations prohibit false or  
25 misleading “former price comparisons,” for example, making up “an artificial, inflated  
26 price ... for the purpose of enabling the subsequent offer of a large reduction” off that  
27 price. 16 C.F.R. § 233.1. They also prohibit false or misleading “retail price  
28 comparisons” and “comparable value comparisons,” for example, ones that falsely

1 suggest that the seller is “offer[ing] goods at prices lower than those being charged by  
2 others for the same merchandise” when this is not the case. 16 C.F.R. § 233.1.

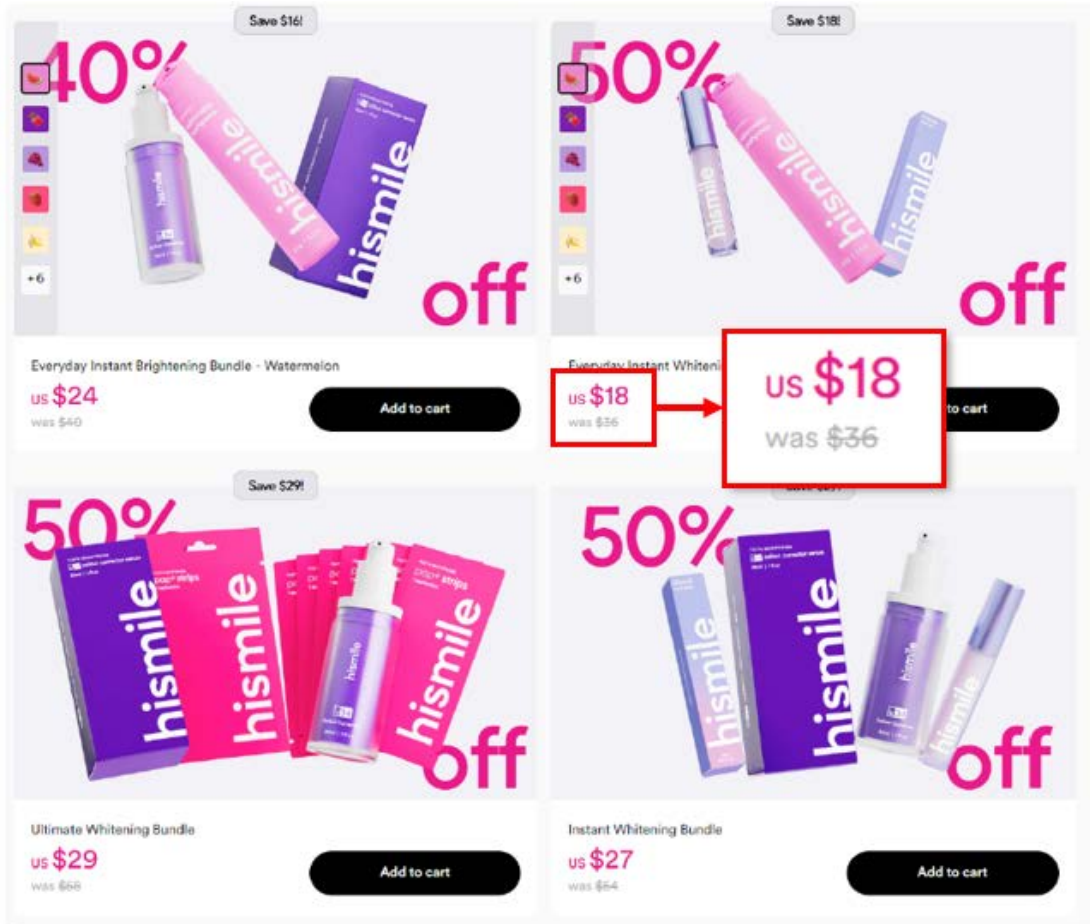
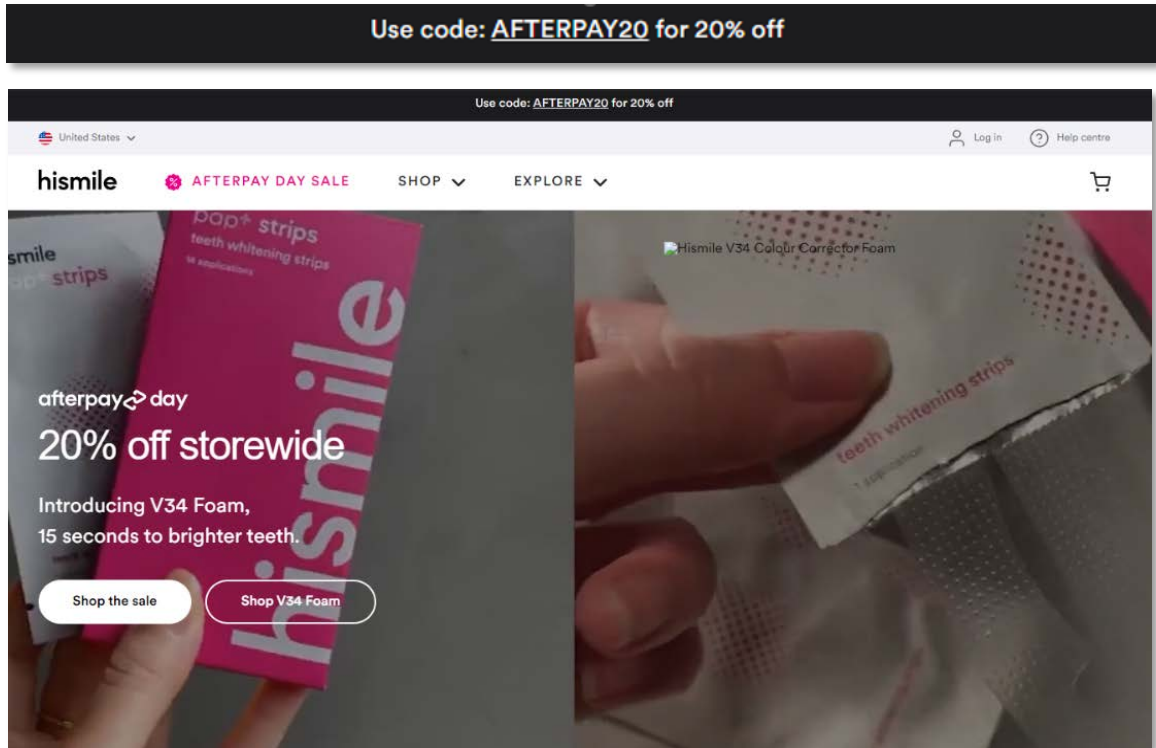
3 7. So, as numerous courts have found, fake sales violate these laws. They also  
4 violate California’s general prohibition on unlawful, unfair, and deceptive business  
5 practices. *See* Cal. Bus. & Prof. Code § 17200.

6 8. Defendant HiSmile Pty Ltd. (“Defendant” or “Hismile”) sells and markets  
7 oral care products online through the Hismile brand and website, us.hismileteeth.com.

8 9. On its website, Defendant lists purported regular prices for its products,  
9 and also advertises purported limited-time discounts from those purported regular prices.  
10 These include “LAST CHANCE” discounts that are purportedly limited in time. These  
11 discounts are made available by using a discount code, such as “SMILE” or are  
12 automatically applied to the all products sitewide. Defendant uses countdown clocks to  
13 represent that their sales are on the verge of ending. Defendant also advertises that its  
14 products have a lower discount price as compared to a higher, regular price shown in  
15 grey and/or strikethrough font. Examples are shown below:



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1           10. But the truth is, Defendant’s sales are not limited in time. The “regular”  
2 prices Defendant advertises are not actually Defendant’s “regular” prices, and the  
3 products are routinely on sale. The purported discounts Defendant advertises are not the  
4 true discount the customer is receiving, and are often not a discount at all. Nor are the  
5 purported discounts limited-time offers or “LAST CHANCE.” Instead, the sales persist.

6           11. As described in greater detail below, Ms. Ponce bought products from  
7 Defendant from its website, us.hismileteeth.com. When Ms. Ponce made her purchase,  
8 Defendant advertised that a 50% off sale was going on, and so Defendant represented  
9 that the products that Ms. Ponce purchased were being offered at a 50% off discount  
10 from its purported “regular” price that Defendant advertised. And based on Defendant’s  
11 representations, Ms. Ponce believed that she was purchasing products whose regular  
12 price and market value was the purported “regular” price that Defendant advertised, that  
13 she was receiving a substantial discount, and that the opportunity to get that discount was  
14 time-limited. These reasonable beliefs are what caused Ms. Ponce to buy from  
15 Defendant when she did.

16           12. In truth, however, the representations Ms. Ponce relied on were not true.  
17 The purported “regular” prices were not the true regular prices, the purported  
18 “discounts” were not the true discounts, and the discounts were ongoing—not time-  
19 limited. Had Defendant been truthful, Ms. Ponce and other consumers like her would  
20 not have purchased the Products, or would have paid less for them.

21           13. Plaintiff brings this case for herself and the other customers who purchased  
22 Hismile Products.

23 **II. Parties**

24           14. Plaintiff Faith Ponce is domiciled in Valencia, California.

25           15. The proposed class includes citizens of every state.

26           16. Defendant HiSmile Pty Ltd. is an Australian proprietary limited company  
27 with its principal place of business at 2563 Gold Coast Hwy Shop 1, Queensland, 4218,  
28 Australia.

1 **III. Jurisdiction and Venue.**

2 17. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(d)(2).  
3 The amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and the  
4 matter is a class action in which one or more members of the proposed class are citizens  
5 of a state different from Defendant.

6 18. The Court has personal jurisdiction over Defendant because Defendant  
7 sold Hismile Products to consumers in California, including to Plaintiff.

8 19. Venue is proper under 28 U.S.C. § 1391(c)(3). Venue is also proper under  
9 28 U.S.C. § 1391(b)(2) because a substantial part of Defendant’s conduct giving rise to  
10 the claims occurred in this District, including Defendant’s sale to Plaintiff.

11 **IV. Facts.**

12 **A. Defendant’s fake prices and fake discounts.**

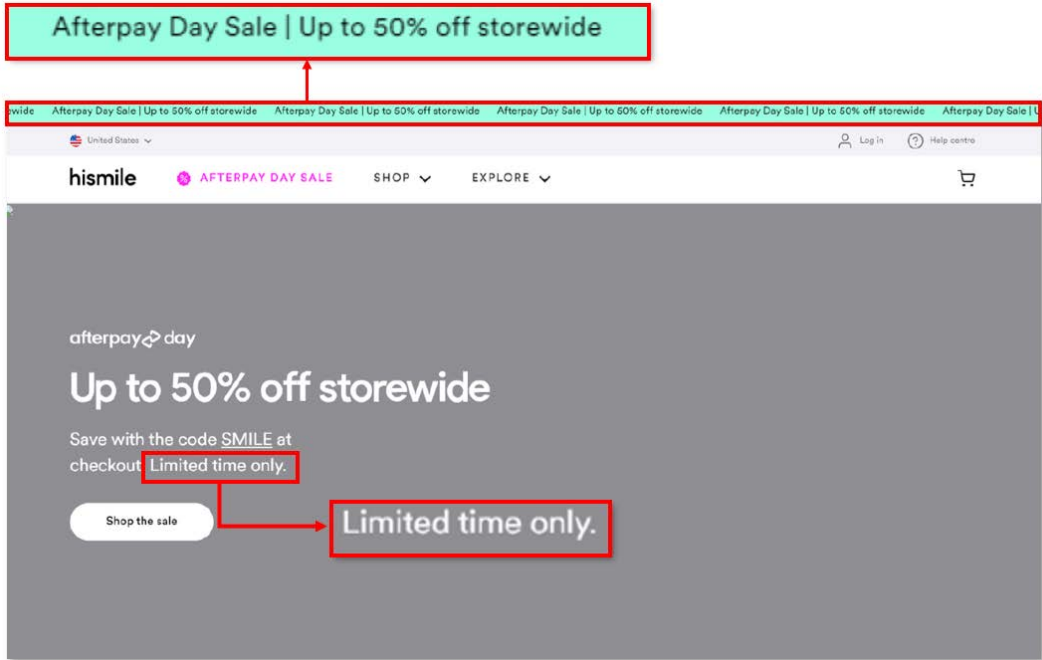
13 20. Defendant HiSmile Pty Ltd. manufactures, distributes, markets, and sells  
14 oral care products directly to consumers through its website, us.hismileteeth.com.  
15 Hismile sells oral care products (“HiSmile Products” or “Products”). The Products are  
16 often sold as part of multi-product bundles, which are purchased as a single package  
17 (“Hismile Bundles” or “Bundles”).

18 21. On its website, Defendant creates the false impression that its Products have  
19 higher regular prices than they truly have.

20 22. In addition, Defendant also creates the false impression that its Bundles’  
21 were previously priced at higher “regular” prices than they truly were.

22 23. On its website, Defendant advertises steep discounts on its Products. These  
23 discounts offer “X%” off the “regular” prices Defendant advertises. Even though in  
24 truth these discounts are not limited in time, Defendant prominently claims they are  
25 “LAST CHANCE” or time-limited. And it advertises these discounts extensively: on an  
26 attention-grabbing banner; in a large banner image on their homepage; on the products  
27 listing pages, next to images; on the individual product pages. Example screenshots are  
28 provided on the following pages:

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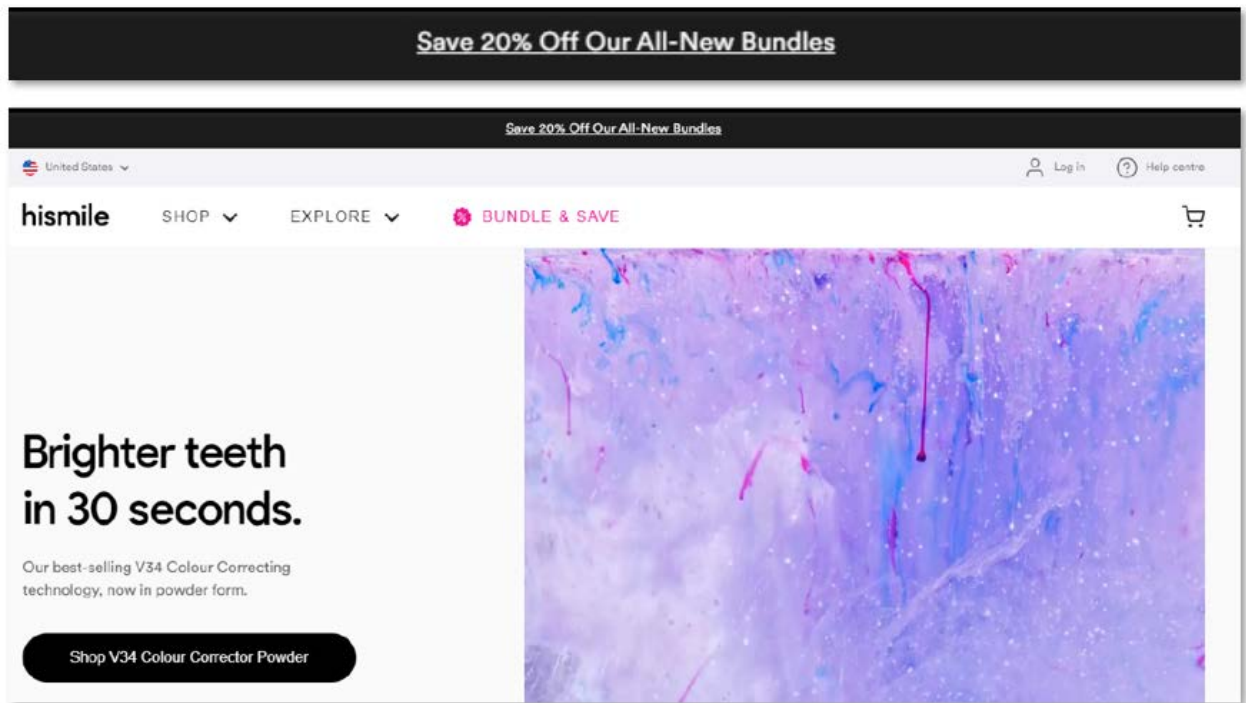


Captured on August 15, 2023



Captured on November 14, 2022





*Captured on July 24, 2022*

15           24. Defendant represents that these discounts will only be available for a limited  
16 time, but in reality, they continue indefinitely. For example, as depicted below, Defendant  
17 represents that its sales expire on a particular date or when the countdown clock expires,  
18 for example: “Sale ends in 2h 11m 15s.” To reasonable consumers, this means that after  
19 the countdown clock expires, Defendant’s Products will no longer be on sale and will  
20 retail at their purported regular price. But immediately after a purportedly time-limited  
21 sale ends, Defendant generates another similar discount, with a new expiration date. In  
22 fact, site-wide sales are pervasive on the HiSmile website.

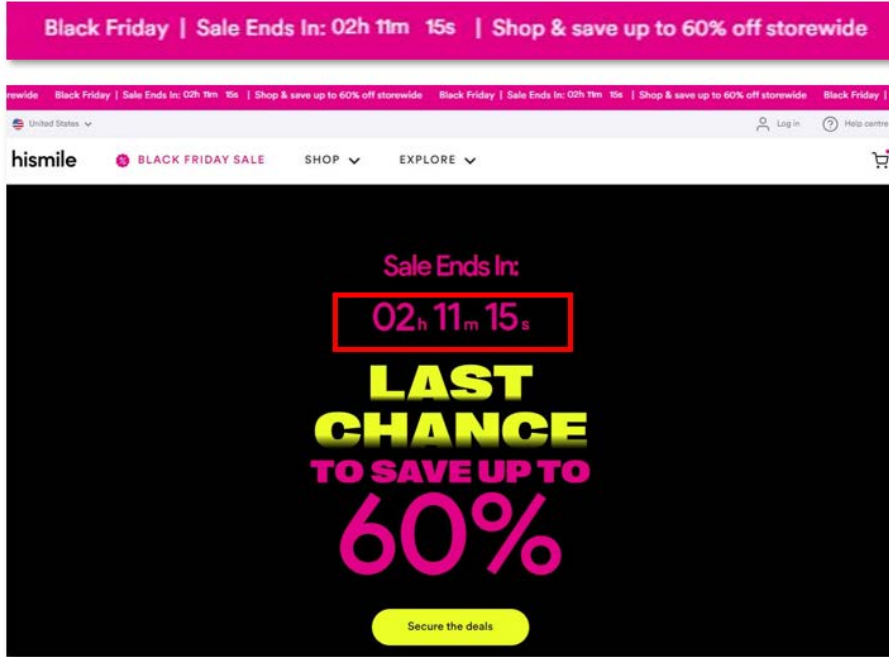
23           25. For example, on November 29, 2023, Defendant advertised a purportedly  
24 time-limited Black Friday sale that was ending in “2h 11m 15s.”

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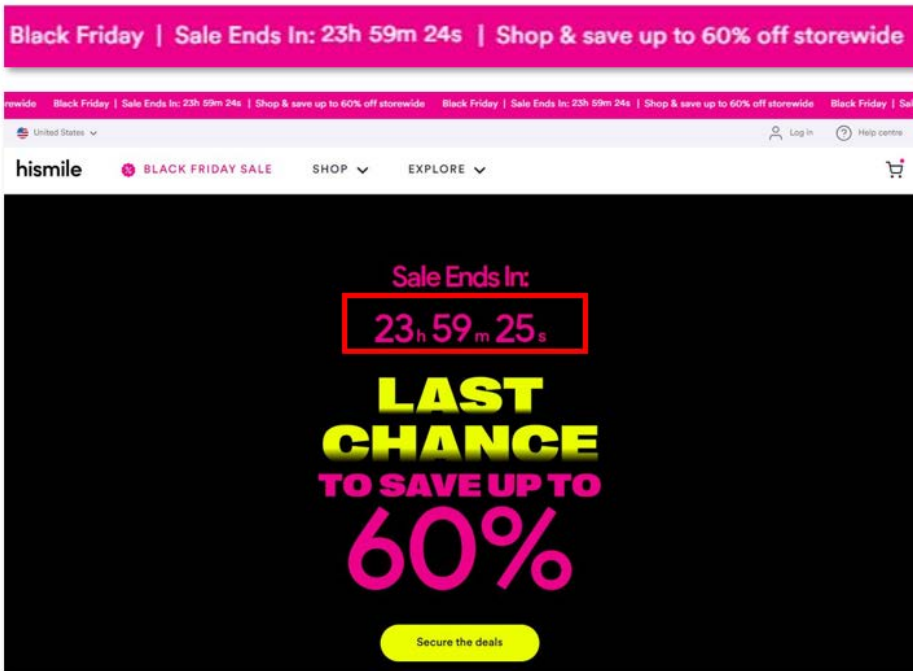
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*Captured on November 29, 2023*

26. However, on November 29, 2023, a few hours after the time-limited sale was supposed to have ended, Defendant advertised the same sale with a new expiration time.



*Captured on November 29, 2023*



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Save \$10.80!

30% off

hismile  
Everyday Instant Whitening Bundle - Blue Raspberry

us \$25.20  
was \$36

Add to cart

Captured February 12, 2023

Save \$16!

40% off

hismile  
Everyday Instant Brightening Bundle - Watermelon

us \$24  
was \$40

Add to cart

Save \$18!

50% off

hismile  
Everyday Instant Whitening Bundle - Watermelon

us \$18  
was \$36

us \$18  
was \$36

Save \$29!

50% off

hismile  
Ultimate Whitening Bundle

us \$29  
was \$68

Add to cart

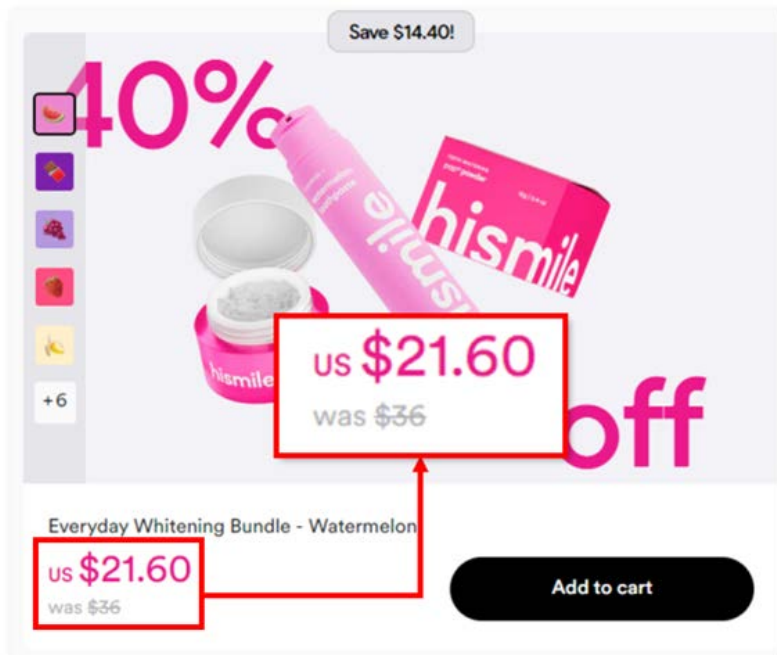
50% off

hismile  
Instant Whitening Bundle

us \$27  
was \$64

Add to cart

Captured December 19, 2023



*Captured January 9, 2024*

30. As shown above, the same Everyday Whitening is always on sale for “X% off” with a purported regular price of \$36, and the customer is not receiving the advertised discount by buying during the purported sale.

31. The advertised discount is prominently displayed in a bold banner at the top of Defendant’s website, including on the homepage, product pages, search pages, and the checkout pages. It appears in a bold and colorful font next to the “Add to cart” button on the product page of every Hismile Bundle.

32. To confirm that Defendant always offers discounts off of purported regular prices for its Bundles, Plaintiff’s counsel performed an investigation of Defendant’s advertising practices using the Internet Archive’s Wayback Machine (available at [www.archive.org](http://www.archive.org)).<sup>1</sup> Defendant’s sales have persisted continuously since at least March 2022. For example, over 20 randomly selected screenshots of Defendant’s website, [us.hismileteeth.com](http://us.hismileteeth.com), were collected from the Internet Archive’s Wayback Machine, from the 2021-2023 period. In addition, 10 additional screenshots from the [us.hismileteeth.com](http://us.hismileteeth.com) website were captured from November 2023 to January 2024 by

<sup>1</sup> The Internet Archive, available at [archive.org](http://archive.org), is a library that archives web pages. <https://archive.org/about/>

1 visiting the website and recording screenshots. For all of the randomly selected  
2 screenshots of Defendant’s website where Bundle pricing was visible, there was a  
3 purportedly time-limited discount on the Bundles.

4 33. In addition, Defendant repeatedly states that a particular Bundle “was”  
5 offered for a higher, strike-through price, when in fact the Bundles are always on sale and  
6 never offered for those higher prices.

7 34. Using these tactics, Defendant leads reasonable consumers to believe that  
8 they will get a discount on the Products that they are purchasing only if they purchase  
9 during the “limited time” promotion. In other words, it leads reasonable consumers to  
10 believe that if they buy now, they will get a Products worth X at a discounted, lower price  
11 Y. This creates a sense of urgency: buy now, and you will receive something worth more  
12 than you pay for it; wait, and you will pay more for the same thing later.

13 35. Based on Defendant’s advertisements, reasonable consumers reasonably  
14 believe that the “regular” prices Defendant advertises are Defendant’s former prices (that  
15 is, the price at which the goods were actually offered for sale before the limited-time offer  
16 went into effect). In other words, reasonable consumers reasonably believe that the  
17 “regular” prices Defendant advertises represent the amount that consumers formerly had  
18 to pay for Defendant’s Products, before the limited-time sale began. Said differently,  
19 reasonable consumers reasonably believe that, prior to the supposedly time-limited sale,  
20 consumers had to pay the “regular” price to get the Products and did not have the  
21 opportunity to get a discount from that “regular” price.

22 36. Reasonable consumers also reasonably believe that the “regular” prices  
23 Defendant advertises represent the true market value of the products, and are the  
24 prevailing prices for those products; and that they are receiving reductions from those  
25 “regular” prices in the amounts advertised. In truth, however, Defendant routinely offers  
26 these discounts off the purportedly “regular” prices it advertises. As a result, everything  
27 about Defendant’s price and purported discount advertising for the Products is false.  
28 The “regular” prices Defendant advertises are not actually Defendant’s “regular” or

1 former prices, or the prevailing prices for the Products Defendant sells, and do not  
2 represent the true market value for the Products, because Defendant's Products are  
3 regularly available for less than that, and customers did not have to formerly pay that  
4 amount to get those items. The purported discounts Defendant advertises are not the  
5 true discount the customer is receiving, and are often not a discount at all. Nor are the  
6 purported discounts "LIMITED TIME" or "EXPIRING SOON"—quite the opposite,  
7 they are routinely available.

8 **B. Defendant's advertisements are unfair, deceptive, and unlawful.**

9 37. Section 17500 of California's False Advertising Law prohibits businesses  
10 from making statements they know or should know to be untrue or misleading. Cal. Bus.  
11 & Prof. Code § 17500. This includes statements falsely suggesting that a product is on  
12 sale, when it actually is not.

13 38. Moreover, section 17501 of California's False Advertising Law specifically  
14 provides that "[n]o price shall be advertised as a former price ... unless the alleged  
15 former price was the prevailing market price ... within three months next immediately  
16 preceding" the advertising. Cal. Bus. & Prof. Code § 17501.

17 39. In addition, California's Consumer Legal Remedies Act prohibits  
18 "advertising goods or services with the intent not to sell them as advertised" and  
19 specifically prohibits "false or misleading statements of fact concerning reasons for,  
20 existence of, or amounts of price reductions." Cal. Civ. Code § 1770(a)(9), (13).

21 40. In addition, the Federal Trade Commission's regulations prohibit false or  
22 misleading "former price comparisons," for example, making up "an artificial, inflated  
23 price ... for the purpose of enabling the subsequent offer of a large reduction" off that  
24 price. 16 C.F.R. § 233.1. They also prohibit false or misleading "retail price  
25 comparisons" and "comparable value comparisons," for example ones that falsely  
26 suggest that the seller is "offer[ing] goods at prices lower than those being charged by  
27 others for the same merchandise" when this is not the case. 16 C.F.R. § 233.1.

28

1           41.     And finally, California’s unfair competition law bans unlawful, unfair, and  
2 deceptive business practices. *See* Cal. Bus. & Prof. Code § 17200.

3           42.     Here, as described in detail above, Defendant makes untrue and misleading  
4 statements about its prices. Defendant advertises former “regular” prices that are not its  
5 true former or “regular” prices, or its former prices, and were not the prevailing market  
6 price in the three months immediately preceding the advertisement. In addition,  
7 Defendant advertised goods or services with the intent not to sell them as advertised, for  
8 example, by advertising goods having certain former prices and/or market values without  
9 the intent to sell goods having those former prices and/or market values. Defendant  
10 made false or misleading statements of fact concerning the reasons for, existence of, and  
11 amounts of price reductions, including the existence of steep discounts, and the amounts  
12 of price reductions resulting from those discounts. And Defendant engaged in unlawful,  
13 unfair, and deceptive business practices.

14           **C.     Defendant’s advertisements harm consumers.**

15           43.     Based on Defendant’s advertisements, reasonable consumers would expect  
16 that the listed regular prices are the “regular” prices at which Defendant usually sells its  
17 Products; that these are the prevailing former prices that Defendant sold its Products at  
18 before the time-limited discount was introduced.

19           44.     Based on Defendant’s advertisements, reasonable consumers would expect  
20 that the listed regular prices are the “regular” prices at which Defendant usually sells its  
21 Bundles; that these are the prevailing former prices that Defendant sold its Bundles at  
22 before the time-limited discount was introduced.

23           45.     Reasonable consumers would also expect that, if they purchase during the  
24 sale, they will receive an item whose regular price and/or market value is the advertised  
25 regular price and that they will receive the advertised discount from the regular purchase  
26 price.

27           46.     In addition, consumers are more likely to buy the product if they believe  
28 that the product is on sale and that they are getting a product with a higher regular price



1 and/or market value at a substantial discount.

2 47. Consumers that are presented with discounts are substantially more likely to  
3 make the purchase. “Nearly two-thirds of consumers surveyed admitted that a  
4 promotion or a coupon often closes the deal, if they are wavering or are undecided on  
5 making a purchase.”<sup>2</sup> And, “two-thirds of consumers have made a purchase they weren’t  
6 originally planning to make solely based on finding a coupon or discount,” while “80%  
7 [of consumers] said they feel encouraged to make a first-time purchase with a brand that  
8 is new to them if they found an offer or discount.”<sup>3</sup>

9 48. Similarly, when consumers believe that an offer is expiring soon, the sense  
10 of urgency makes them more likely to buy a product.<sup>4</sup>

11 49. Thus, Defendant’s advertisements harm consumers by inducing them to  
12 make purchases based on false information. In addition, by this same mechanism,  
13 Defendant’s advertisements artificially increase consumer demand for Defendant’s  
14 products. This puts upward pressure on the prices that Defendant can charge for its  
15 products. As a result, Defendant can charge a price premium for its products, that it  
16 would not be able to charge absent the misrepresentations described above. So, due to  
17 Defendant’s misrepresentations, Plaintiff and the class paid more for the products that  
18 they bought than they otherwise would have.

19 **D. Plaintiff was misled by Defendant’s misrepresentations.**

20 50. On November 28, 2023, Ms. Ponce bought an Ultimate Whitening Bundle  
21 (V34 Colour Corrector Serum and PAP+ Whitening Strips – 7 Pack) from the Hismile  
22 website, us.hismileteeth.com, while living Valencia, California.

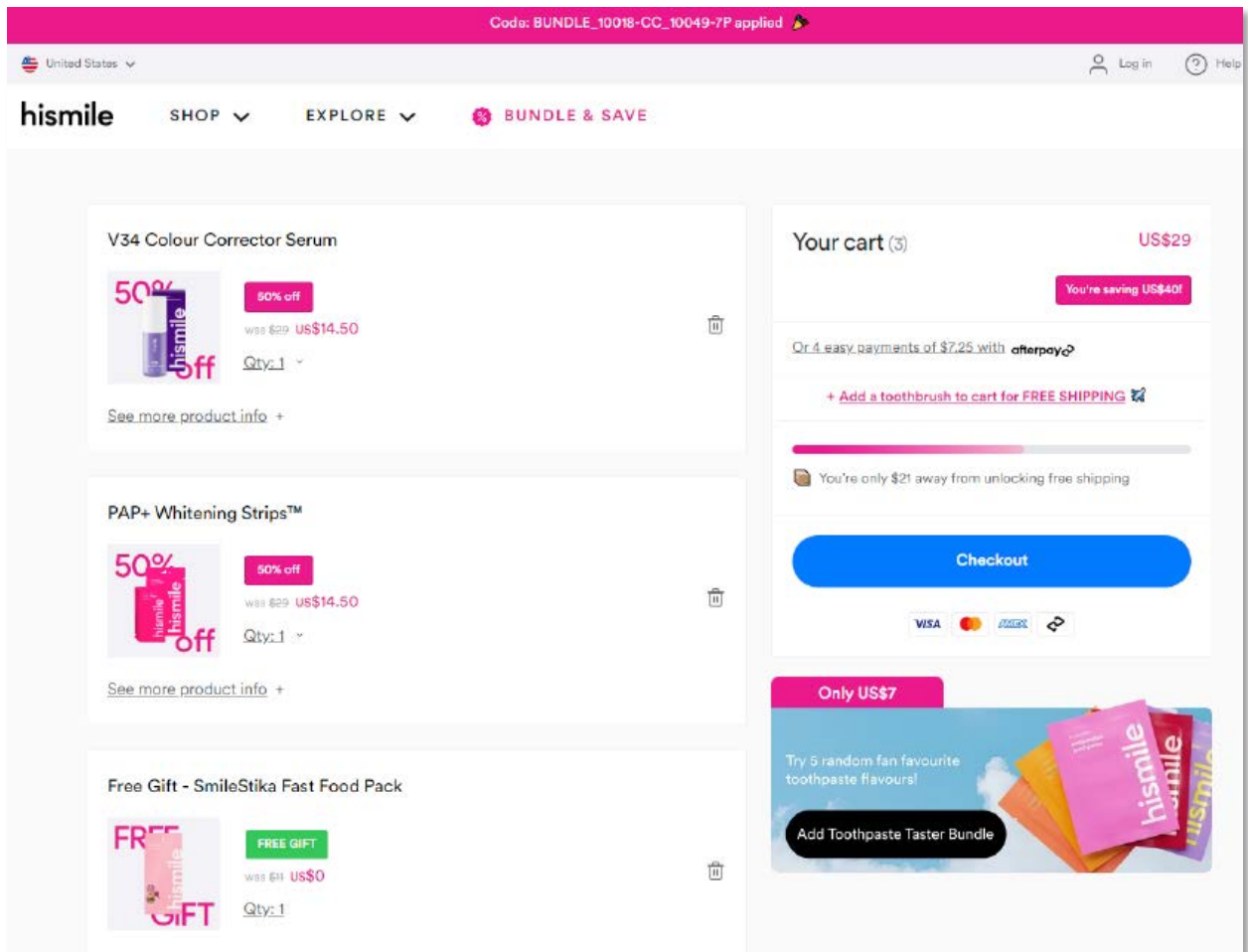
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24 <sup>2</sup> [https://www.invespcro.com/blog/how-discounts-affect-online-consumer-  
25 buying-behavior/](https://www.invespcro.com/blog/how-discounts-affect-online-consumer-buying-behavior/).



26 <sup>3</sup> RetailMeNot Survey: Deals and Promotional Offers Drive Incremental Purchases  
Online, Especially Among Millennial Buyers (prnewswire.com).

27 <sup>4</sup> <https://cxl.com/blog/creating-urgency/> (addition of a countdown timer  
28 increased conversion rates from 3.4%-10%); Dynamic email content leads to 400%  
increase in conversions for Black Friday email | Adestra (uplandsoftware.com) (400%  
higher conversation rate for ad with countdown timer).

1           51. On November 28, 2023, Defendant represented on its website that a time-  
 2 limited, “50% off” was running for the bundle she purchased, and that the sale applied to  
 3 Ms. Ponce’s order:



21           52. In the email order confirmation that Defendant sent to Ms. Ponce,  
 22 Defendant represented the Hismile Ultimate Whitening Bundle had a regular price of \$58,  
 23 and that Ms. Ponce was receiving a discount of \$29. Defendant also represented that Ms.  
 24 Ponce was receiving a discount of \$29:

Items ordered		
	V34 Colour Corrector Serum x 1	\$29.00 USD
	PAP+ Whitening Strips - 7 Pack x 1	\$29.00 USD
Discount		-\$29.00 USD

53. Defendant represented that the Bundles had a certain regular price and that Ms. Ponce was receiving a substantial discount for the items that she purchased.

54. Ms. Ponce read and relied on Defendant's representations on the website and email confirmation, specifically that the Bundles were being offered at a discount for a limited time and had the "regular" prices listed above. Based on Defendant's representations described and shown above, Ms. Ponce reasonably understood that the Bundle she was purchasing regularly (and before the promotion Defendant was advertising) retailed at the published "regular" price, that this "regular" price was the market value of the Bundle that she was buying, that she was receiving the advertised discount as compared to the regular price, and that advertised discount was only available for a limited time (during the limited time promotion). She would not have made the purchase if she had known that the Bundles were not discounted as advertised, and that she was not receiving the advertised discount.

55. Plaintiff faces an imminent threat of future harm. Plaintiff would purchase Bundles from Defendant again in the future if she could feel sure that Defendant's "regular" prices accurately reflected Defendant's former prices and the market value of the Bundles, and that its discounts were truthful. But without an injunction, Plaintiff has no realistic way to know which—if any—of Defendant's "regular" prices, discounts, and sales are not false or deceptive. For example, while she could watch a sale until the countdown ends to see if the sale is permanent, doing so could result in her missing out

1 on the sale (*e.g.*, if the sale is actually limited in time, and not permanent). Accordingly,  
2 Plaintiff is unable to rely on Defendant's advertising in the future, and so cannot  
3 purchase Bundles she would like to purchase.

4 **E. Defendant breached its contract.**

5 56. When Ms. Ponce purchased and paid for the Hismile Bundle she bought as  
6 described above, she accepted offers that Defendant made, and thus, a contract was  
7 formed at the time that she made a purchase. The offer was to provide Bundles having a  
8 particular listed regular price and market value, and to provide that Bundle at the  
9 discounted price advertised on the website.

10 57. Defendant's website and email confirmations list the market value of the  
11 items that Defendant promised to provide (which are shown above). Defendant agreed  
12 to provide a discount equal to the difference between the regular prices listed by  
13 Defendant, and the prices paid by Ms. Ponce (also shown above). For example,  
14 Defendant offered to provide (among other things) the Hismile Ultimate Whitening  
15 Bundle with a market value of \$58, for a discounted price of \$29; and to provide a  
16 discount of \$29.

17 58. The regular price and market value of the items Ms. Ponce would receive,  
18 and the amount of the discount she would be provided off the regular price of those  
19 items, were specific and material terms of the contract.

20 59. Ms. Ponce performed her obligations under the contract by paying for the  
21 items she purchased.

22 60. Defendant breached its contract by failing to provide Ms. Ponce with  
23 Bundles that have a regular price and market value equal to the regular price displayed,  
24 and by failing to provide the discount it promised.

25 **F. No adequate remedy at law.**

26 61. Plaintiff seeks damages and, in the alternative, restitution. Plaintiff is  
27 permitted to seek equitable remedies in the alternative because she has no adequate  
28 remedy at law.

1           62. A legal remedy is not adequate if it is not as certain as an equitable  
2 remedy. The elements of Plaintiff's equitable claims are different and do not require the  
3 same showings as Plaintiff's legal claims. For example, Plaintiff's FAL claim under  
4 Section 17501 (an equitable claim) is predicated on a specific statutory provision, which  
5 prohibits advertising merchandise using a former price if that price was not the prevailing  
6 market price within the past three months. Cal. Bus. & Prof. Code § 17501. Plaintiff  
7 may be able to prove these more straightforward factual elements, and thus prevail under  
8 the FAL, while not being able to prove one or more elements of her legal claims.

9           63. In addition, to obtain a full refund as damages, Plaintiff must show that the  
10 Products she bought has essentially no market value. In contrast, Plaintiff can seek  
11 restitution without making this showing. This is because Plaintiff purchased Products that  
12 she would not otherwise have purchased, but for Defendant's representations. Obtaining  
13 a full refund at law is less certain than obtaining a refund in equity.

14           64. In addition, the remedies at law available to Plaintiff are not equally prompt  
15 or otherwise efficient. The need to schedule a jury trial may result in delay. And a jury  
16 trial will take longer, and be more expensive, than a bench trial.

17 **V. Class action allegations.**

18           65. Plaintiff brings the asserted claims on behalf of the proposed class of:

- 19           • Nationwide Class: all persons who, within the applicable statute of  
20 limitations period, purchased one or more Hismile Products advertised at a  
21 discount on Defendant's website.  
22           • California Subclass: all persons who, while in the state of California and  
23 within the applicable statute of limitations period, purchased one or more  
24 Hismile Products advertised at a discount on Defendant's website.

25           66. The following people are excluded from the class: (1) any Judge or  
26 Magistrate Judge presiding over this action and the members of their family; (2)  
27 Defendant, Defendant's subsidiaries, parents, successors, predecessors, and any entity in  
28 which the Defendant or its parents have a controlling interest and their current

1 employees, officers, and directors; (3) persons who properly execute and file a timely  
2 request for exclusion from the class; (4) persons whose claims in this matter have been  
3 finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and  
4 Defendant's counsel, and their experts and consultants; and (6) the legal representatives,  
5 successors, and assigns of any such excluded persons.

6 ***Numerosity & Ascertainability***

7 67. The proposed class contains members so numerous that separate joinder of  
8 each member of the class is impractical. There are tens or hundreds of thousands of  
9 class members.

10 68. Class members can be identified through Defendant's sales records and  
11 public notice.

12 ***Predominance of Common Questions***

13 69. There are questions of law and fact common to the proposed class.  
14 Common questions of law and fact include, without limitation:

- 15 (1) whether Defendant made false or misleading statements of fact in its  
16 advertisements;
- 17 (2) whether Defendant violated California's consumer protection statutes;
- 18 (3) whether Defendant committed a breach of contract;
- 19 (4) whether Defendant committed a breach of an express or implied warranty;
- 20 (5) damages needed to reasonably compensate Plaintiff and the proposed class.

21 ***Typicality & Adequacy***

22 70. Plaintiff's claims are typical of the proposed class. Like the proposed class,  
23 Plaintiff purchased the Hismile Products advertised at a discount from Defendant. There  
24 are no conflicts of interest between Plaintiff and the class.

25 ***Superiority***

26 71. A class action is superior to all other available methods for the fair and  
27 efficient adjudication of this litigation because individual litigation of each claim is  
28 impractical. It would be unduly burdensome to have individual litigation of millions of

1 individual claims in separate lawsuits, every one of which would present the issues  
2 presented in this lawsuit.

3 **VI. Claims.**

4 **First Cause of Action:**

5 **Violation of California's False Advertising Law Bus. & Prof. Code §§ 17500 &  
6 17501 et. seq.**

7 **(By Plaintiff and the California Subclass)**

8 72. Plaintiff incorporates each and every factual allegation set forth above.

9 73. Plaintiff brings this cause of action on behalf of herself and members of the  
10 California Subclass.

11 74. Defendant has violated Sections 17500 and 17501 of the Business and  
12 Professions Code.

13 75. Defendant has violated, and continues to violate, Section 17500 of the  
14 Business and Professions Code by disseminating untrue and misleading advertisements to  
15 Plaintiff and subclass members.

16 76. As alleged more fully above, Defendant advertises former prices along with  
17 discounts. Defendant does this, for example, by crossing out a higher price (*e.g.*, \$59) and  
18 displaying it next to a lower, discounted price. Reasonable consumers would understand  
19 prices denoted as "regular" prices from which time-limited discounts are calculated to  
20 denote "former" prices, i.e., the prices that Defendant charged before the time-limited  
21 discount went into effect.

22 77. The prices advertised by Defendant are not Defendant's "regular" prices.  
23 Instead, Defendant routinely has a heavily-advertised promotion running, entitling  
24 consumers to a discount. Moreover, for the same reasons, those prices were not the  
25 former prices of the Products. Accordingly, Defendant's statements about the former  
26 prices of its Products, and its statements about its discounts from those former prices,  
27 were untrue and misleading. In addition, Defendant's statements that its discounts are  
28 "limited time" and only "valid" for a certain time period are false and misleading too.





1           85. Plaintiff and the subclass are “consumers,” as the term is defined by  
2 California Civil Code § 1761(d).

3           86. Plaintiff and the subclass have engaged in “transactions” with Defendant as  
4 that term is defined by California Civil Code § 1761(e).

5           87. The conduct alleged in this Complaint constitutes unfair methods of  
6 competition and unfair and deceptive acts and practices for the purpose of the CLRA,  
7 and the conduct was undertaken by Defendant in transactions intended to result in, and  
8 which did result in, the sale of goods to consumers.

9           88. As alleged more fully above, Defendant made and disseminated untrue and  
10 misleading statements of facts in its advertisements to subclass members. Defendant did  
11 this by using fake regular prices, i.e., regular prices that are not the prevailing prices, and  
12 by advertising fake discounts.

13           89. Defendant violated, and continues to violate, section 1770 of the California  
14 Civil Code.

15           90. Defendant violated, and continues to violate, section 1770(a)(5) of the  
16 California Civil Code by representing that Products offered for sale have characteristics  
17 or benefits that they do not have. Defendant represents that the value of its Products is  
18 greater than it actually is by advertising inflated regular prices and fake discounts for  
19 Products.

20           91. Defendant violated, and continues to violate, section 1770(a)(9) of the  
21 California Civil Code. Defendant violates this by advertising its Products as being  
22 offered at a discount, when in fact Defendant does not intend to sell the Products at a  
23 discount.

24           92. And Defendant violated, and continues to violate section 1770(a)(13) by  
25 making false or misleading statements of fact concerning reasons for, existence of, or  
26 amounts of, price reductions on its website, including by (1) misrepresenting the regular  
27 price of Products on its website, (2) advertising discounts and savings that are  
28 exaggerated or nonexistent, (3) misrepresenting that the discounts and savings are

1 unusually large, when in fact they are regularly available (4) misrepresenting the reason  
2 for the sale (e.g., “Presidents Day Sale,” when in fact the sale is ongoing and not limited to  
3 Presidents Day).

4 93. Defendant’s representations were likely to deceive, and did deceive, Plaintiff  
5 and reasonable consumers. Defendant knew, or should have known through the exercise  
6 of reasonable care, that these statements were inaccurate and misleading.

7 94. Defendant’s misrepresentations were intended to induce reliance, and  
8 Plaintiff saw, read, and reasonably relied on them when purchasing Hismile Products.  
9 Defendant’s misrepresentations were a substantial factor in Plaintiff’s purchase decision.

10 95. In addition, subclass-wide reliance can be inferred because Defendant’s  
11 misrepresentations were material, i.e., a reasonable consumer would consider them  
12 important in deciding whether to buy the Hismile Products.

13 96. Defendant’s misrepresentations were a substantial factor and proximate  
14 cause in causing damages and losses to Plaintiff and the subclass.

15 97. Plaintiff and the subclass were injured as a direct and proximate result of  
16 Defendant’s conduct because (a) they would not have purchased Hismile Products if they  
17 had known the discounts and/or regular prices were not real, (b) they overpaid for the  
18 Products because the Products were sold at a price premium due to the  
19 misrepresentation, and/or (c) they received products with market values lower than the  
20 promised market values.

21 98. Accordingly, pursuant to California Civil Code § 1780(a)(2), Ms. Ponce, on  
22 behalf of herself and all other members of the subclass, seeks injunctive relief.

23 99. CLRA § 1782 NOTICE. On January 11, 2024, a CLRA demand letter was  
24 sent to Defendant’s headquarters in Australia via certified mail (return receipt requested),  
25 that provided notice of Defendant’s violations of the CLRA and demanded that  
26 Defendant correct the unlawful, unfair, false and/or deceptive practices alleged here.  
27 Defendant does not have a California headquarters or a California registered agent. This  
28 letter provided notice of Defendant’s violation of the CLRA and demanded that

1 Defendant correct the unlawful, unfair, false and/or deceptive practices alleged here.  
2 Defendant did not respond within the 30-day notice period. Accordingly, Plaintiff seeks  
3 all monetary and equitable relief allowed under the CLRA, including actual damages,  
4 punitive damages, and reasonable attorneys' fees..

5 100. A CLRA venue declaration is attached.

6 **Third Cause of Action:**

7 **Violation of California's Unfair Competition Law**

8 **(by Plaintiff and the California Subclass)**

9 101. Plaintiff incorporates each and every factual allegation set forth above.

10 102. Plaintiff brings this cause of action on behalf of herself and members of the  
11 California Subclass.

12 103. Defendant has violated California's Unfair Competition Law (UCL) by  
13 engaging in unlawful, fraudulent, and unfair conduct (i.e., violating each of the three  
14 prongs of the UCL).

15 ***The Unlawful Prong***

16 104. Defendant engaged in unlawful conduct by violating the CLRA and FAL, as  
17 alleged above and incorporated here. In addition, Defendant engaged in unlawful  
18 conduct by violating the FTCA. The FTCA prohibits "unfair or deceptive acts or  
19 practices in or affecting commerce" and prohibits the dissemination of false  
20 advertisements. 15 U.S.C. § 45(a)(1), 15 U.S.C. § 52(a). As the FTC's regulations make  
21 clear, Defendant's false pricing schemes violate the FTCA. 16 C.F.R. § 233.1, § 233.2.

22 ***The Deceptive Prong***

23 105. As alleged in detail above, Defendant's representations that its Products  
24 were on sale, that the sale was limited in time, that the Products had a specific regular  
25 price, and that the customers were receiving discounts were false and misleading.

26 106. Defendant's representations were misleading to Plaintiff and other  
27 reasonable consumers.

28

1 107. Plaintiff relied upon Defendant’s misleading representations and omissions,  
2 as detailed above.

3 *The Unfair Prong*

4 108. As alleged in detail above, Defendant committed “unfair” acts by falsely  
5 advertising that its Products were on sale, that the sale was limited in time, that the  
6 Products had a specific regular price, and that the customers were receiving discounts.

7 109. Defendant violated established public policy by violating the CLRA, the  
8 FAL, and the FTCA, as alleged above and incorporated here. The unfairness of this  
9 practice is tethered to a legislatively declared policy (that of the CLRA, the FAL, and the  
10 FTCA).

11 110. The harm to Plaintiff and the subclass greatly outweighs the public utility of  
12 Defendant’s conduct. There is no public utility to misrepresenting the price of a  
13 consumer product. This injury was not outweighed by any countervailing benefits to  
14 consumers or competition. Misleading consumer products only injure healthy  
15 competition and harm consumers.

16 111. Plaintiff and the subclass could not have reasonably avoided this injury. As  
17 alleged above, Defendant’s representations were deceptive to reasonable consumers like  
18 Plaintiff.

19 112. Defendant’s conduct, as alleged above, was immoral, unethical, oppressive,  
20 unscrupulous, and substantially injurious to consumers.

21 \* \* \*

22 113. For all prongs, Defendant’s representations were intended to induce  
23 reliance, and Plaintiff saw, read, and reasonably relied on them when purchasing Hismile  
24 Products. Defendant’s representations were a substantial factor in Plaintiff’s purchase  
25 decision.

26 114. In addition, subclass-wide reliance can be inferred because Defendant’s  
27 representations were material, i.e., a reasonable consumer would consider them important  
28 in deciding whether to buy Hismile Products.

1 115. Defendant's representations were a substantial factor and proximate cause  
2 in causing damages and losses to Plaintiff and the subclass members.

3 116. Plaintiff and the subclass were injured as a direct and proximate result of  
4 Defendant's conduct because (a) they would not have purchased the Hismile Products if  
5 they had known that they were not discounted, and/or (b) they overpaid for the Products  
6 because the Products were sold at the regular price and not at a discount.

7 **Fourth Cause of Action:**

8 **Breach of Contract**

9 **(by Plaintiff and the Nationwide Class)**

10 117. Plaintiff incorporates each and every factual allegation set forth above.

11 118. Plaintiff brings this cause of action on behalf of herself and the Nationwide  
12 Class. In the alternative, Plaintiff brings this cause of action on behalf of herself and the  
13 California Subclass.

14 119. Plaintiff and class members entered into contracts with Defendant when  
15 they placed orders to purchase Products on Defendant's website.

16 120. The contracts provided that Plaintiff and class members would pay  
17 Defendant for the Products purchased.

18 121. The contracts further required that Defendant provides Plaintiff and class  
19 members with Products that have a market value equal to the regular prices displayed on  
20 the website. They also required that Defendant provide Plaintiff and class members with  
21 a discount equal to the difference between the price paid, and the regular prices  
22 advertised. These were specific and material terms of the contract.

23 122. The specific discounts were a specific and material term of each contract.

24 123. Plaintiff and class members paid Defendant for the Products they  
25 purchased, and satisfied all other conditions of their contracts.

26 124. Defendant breached its contracts with Plaintiff and class members by failing  
27 to provide Products that had a "regular" price, former price, and/or prevailing market  
28

1 value equal to the regular price displayed on its website, and by failing to provide the  
2 promised discount. Defendant did not provide the discount that it had promised.

3 125. Plaintiff provided Defendant with notice of this breach of warranty, by  
4 mailing a notice letter to Defendant's headquarters, on January 11, 2024.

5 126. As a direct and proximate result of Defendant's breaches, Plaintiff and class  
6 members were deprived of the benefit of their bargained-for exchange, and have suffered  
7 damages in an amount to be established at trial.

8 **Fifth Cause of Action:**

9 **Breach of Express Warranty**

10 **(by Plaintiff and the California Subclass)**

11 127. Plaintiff incorporates each and every factual allegation set forth above.

12 128. Plaintiff brings this cause of action on behalf of herself and members of the  
13 California Subclass.

14 129. Defendant, as the manufacturer, marketer, distributor, supplier, and/or  
15 seller of the Hismile Products, issued material, written warranties by advertising that the  
16 Products had a prevailing market value equal to the regular price displayed on  
17 Defendant's website. This was an affirmation of fact about the Products (i.e., a  
18 representation about the market value) and a promise relating to the goods.

19 130. This warranty was part of the basis of the bargain and Plaintiff and  
20 members of the subclass relied on this warranty.

21 131. In fact, the Hismile Products' stated market value was not the prevailing  
22 market value. Thus, the warranty was breached.

23 132. Plaintiff provided Defendant with notice of this breach of warranty, by  
24 mailing a notice letter to Defendant's headquarters, on January 11, 2024.

25 133. Plaintiff and the subclass were injured as a direct and proximate result of  
26 Defendant's breach, and this breach was a substantial factor in causing harm, because (a)  
27 they would not have purchased Hismile Products if they had known that the warranty  
28

1 was false, or (b) they overpaid for the Products because the Products were sold at a price  
2 premium due to the warranty.

3 **Sixth Cause of Action:**

4 **Quasi-Contract/Unjust Enrichment**

5 **(by Plaintiff and the Nationwide Class)**

6 134. Plaintiff incorporates each and every factual allegation in paragraphs 1-45,  
7 51-60 above.

8 135. Plaintiff brings this cause of action on behalf of herself and the Nationwide  
9 Class. In the alternative, Plaintiff brings this claim on behalf of herself and the California  
10 Subclass.

11 136. As alleged in detail above, Defendant's false and misleading advertising  
12 caused Plaintiff and the class to purchase Hismile Products and to pay a price premium  
13 for these Products.

14 137. In this way, Defendant received a direct and unjust benefit, at Plaintiff's  
15 expense.

16 138. Plaintiff and the class seek restitution, and in the alternative, rescission.

17 **Seventh Cause of Action:**

18 **Negligent Misrepresentation**

19 **(by Plaintiff and the California Subclass)**

20 139. Plaintiff incorporates each and every factual allegation set forth above.

21 140. Plaintiff brings this cause of action on behalf of herself and members of the  
22 California Subclass.

23 141. As alleged more fully above, Defendant made false representations and  
24 material omissions of fact to Plaintiff and subclass members concerning the existence  
25 and/or nature of the discounts and savings advertised.

26 142. These representations were false.  
27  
28

1 143. When Defendant made these misrepresentations, it knew or should have  
2 known that they were false. Defendant had no reasonable grounds for believing that  
3 these representations were true when made.

4 144. Defendant intended that Plaintiff and subclass members rely on these  
5 representations and Plaintiff and subclass members read and reasonably relied on them.

6 145. In addition, subclass-wide reliance can be inferred because Defendant's  
7 misrepresentations were material, i.e., a reasonable consumer would consider them  
8 important in deciding whether to buy the Hismile Products.

9 146. Defendant's misrepresentations were a substantial factor and proximate  
10 cause in causing damages and losses to Plaintiff and subclass members.

11 147. Plaintiff and subclass members were injured as a direct and proximate result  
12 of Defendant's conduct because (a) they would not have purchased Hismile Products if  
13 they had known that the representations were false, and/or (b) they overpaid for the  
14 Products because the Products were sold at a price premium due to the  
15 misrepresentation.

16 **Eighth Cause of Action:**

17 **Intentional Misrepresentation**

18 **(by Plaintiff and the California Subclass)**

19 148. Plaintiff incorporates each and every factual allegation set forth above.

20 149. Plaintiff brings this cause of action on behalf of herself and members of the  
21 California Subclass.

22 150. As alleged more fully above, Defendant made false representations and  
23 material omissions of fact to Plaintiff and subclass members concerning the existence  
24 and/or nature of the discounts and savings advertised.

25 151. These representations were false.

26 152. When Defendant made these misrepresentations, it knew that they were  
27 false at the time that it made them and/or acted recklessly in making the  
28 misrepresentations.



1 153. Defendant intended that Plaintiff and subclass members rely on these  
2 representations and Plaintiff and subclass members read and reasonably relied on them.

3 154. In addition, subclass-wide reliance can be inferred because Defendant's  
4 misrepresentations were material, i.e., a reasonable consumer would consider them  
5 important in deciding whether to buy the Hismile Products.

6 155. Defendant's misrepresentations were a substantial factor and proximate  
7 cause in causing damages and losses to Plaintiff and subclass members.

8 156. Plaintiff and subclass members were injured as a direct and proximate result  
9 of Defendant's conduct because (a) they would not have purchased Hismile Products if  
10 they had known that the representations were false, and/or (b) they overpaid for the  
11 Products because the Products were sold at a price premium due to the  
12 misrepresentation.

13 **VII. Relief.**

14 157. Plaintiff seeks the following relief for herself and the proposed class:

- 15 • An order certifying the asserted claims, or issues raised, as a class action;
- 16 • A judgment in favor of Plaintiff and the proposed class;
- 17 • Damages, treble damages, and punitive damages where applicable;
- 18 • Restitution;
- 19 • Rescission;
- 20 • Disgorgement, and other just equitable relief;
- 21 • Pre- and post-judgment interest;
- 22 • An injunction prohibiting Defendant's deceptive conduct, as allowed by  
23 law;
- 24 • Reasonable attorneys' fees and costs, as allowed by law;
- 25 • Any additional relief that the Court deems reasonable and just.

26 **VIII. Demand for Jury Trial.**

27 158. Plaintiff demands the right to a jury trial on all claims so triable.  
28

1 Dated: February 23, 2024

Respectfully submitted,

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